

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	
U.S. Department of Justice)	
Environment & Natural)	
Resources Division)	
10th & Pennsylvania Ave., N.W.)	
Washington, D.C. 20530)	
)	Civil Action No.
Plaintiff,)	
v.)	
)	
McCULLOCH CORPORATION)	
12802 Leffingwell Road)	
Santa Fe Springs, CA 90670)	
)	
JENN FENG INDUSTRIAL CO., LTD.)	
No. 19, Lane 118)	
Section 2, Min Tsu Road)	
Ping Chang City,)	
Taoyuan, Taiwan, R.O.C.)	
)	
MTD PRODUCTS INC)	
5903 Grafton Road)	
Valley City, OH 44280)	
)	
MTD SOUTHWEST INC)	
9235 S. McKemy)	
Tempe, AZ 85284)	

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), files this complaint and alleges as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to Sections 204, 205, and 213 of the Clean Air Act (“the Act”), 42 U.S.C. §§ 7523, 7524, and 7547, for injunctive relief and the assessment of civil penalties for violations of the Act and regulations promulgated thereunder at 40 C.F.R. Part 90 (“Nonroad SI Regulations”), which arose from the importation and introduction into commerce in the United States of approximately 200,000 chainsaws (“Subject Chainsaws”) that failed to comply with the Nonroad SI Regulations.

2. Jenn Feng Industrial Co. Ltd. (“Jenn Feng”) manufactured the Subject Chainsaws and introduced them, or delivered them for introduction, into commerce in the United States. McCulloch Corporation (“McCulloch”) obtained a certificate of conformity from EPA intended to cover the engines that powered the Subject Chainsaws, and caused the importation of the Subject Chainsaws into commerce in the United States. MTD Southwest Inc and/or MTD Products Inc (collectively, “MTD”) imported, caused the importation of, and/or distributed the Subject Chainsaws into commerce in the United States.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of and the parties to this action pursuant to Sections 203, 204, 205, and 213 of the Act, 42 U.S.C. §§ 7522, 7523, 7524, and 7547, and 28 U.S.C. §§ 1331, 1345, and 1355. This Court also has in personam jurisdiction over Jenn Feng, McCulloch, and MTD (collectively the “Defendants”) and/or Defendants have consented to in personam jurisdiction for purposes of this action.

4. Venue is proper in this jurisdiction pursuant to Section 204 and 205 of the Act, 42 U.S.C. §§ 7523 and 7524, because the Administrator has his principal place of business here.

DEFENDANTS

5. Jenn Feng is incorporated under the laws of the Republic of China, and is doing business in the United States through McCulloch. Jenn Feng is a “person” within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e), and a “manufacturer” within the meaning of Section 216(1) of the Act, 42 U.S.C. § 7550(1).

6. McCulloch, a wholly owned subsidiary of Jenn Feng, is incorporated under the laws of the State of Arizona and is doing business throughout the United States. McCulloch is a “person” within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e), and a “manufacturer” within the meaning of Section 216(1) of the Act, 42 U.S.C. § 7550(1).

7. MTD Products Inc is incorporated under the laws of the State of Delaware, and is doing business throughout the United States. MTD Products Inc is a “person” within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e), and a “manufacturer” within the meaning of Section 216(1) of the Act, 42 U.S.C. § 7550(1).

8. MTD Southwest Inc, a wholly owned subsidiary of MTD Products Inc, is incorporated under the laws of the State of Arizona, and is doing business throughout the United States. MTD Southwest Inc is a “person” within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e), and a “manufacturer” within the meaning of Section 216(1) of the Act, 42 U.S.C. § 7550(1).

STATUTORY AND REGULATORY BACKGROUND

9. Sections 213(a)(1) and (a)(2) of the Act, 42 U.S.C. § 7547(a)(1) and (a)(2), required EPA to conduct a study of emissions from nonroad engines and vehicles, and to determine whether emissions of certain pollutants from nonroad engines and vehicles are

significant contributors to ozone or carbon monoxide (“CO”) in more than one area which has failed to attain the National Ambient Air Quality Standards for these pollutants.

10. Sections 213(a)(3) and (a)(4) of the Act, 42 U.S.C. § 7547(a)(3) and (a)(4), required EPA to promulgate regulations to reduce emissions from those categories or classes of nonroad engines and vehicles that cause or contribute to ozone or CO air pollution if nonroad emissions are determined to be significant, and authorized EPA to regulate other emissions from nonroad engines or vehicles if the agency determines that they contribute to other forms of air pollution which may reasonably be anticipated to endanger public health or welfare.

11. On June 17, 1994, EPA made an affirmative determination that nonroad engines are significant contributors to ambient ozone or CO levels in more than one nonattainment area, and that emissions from these engines cause or contribute to air pollution that “may reasonably be anticipated to endanger public health or welfare.” *See 59 Fed. Reg.* 31306, 31307 (June 17, 1994).

12. On July 3, 1995, EPA promulgated Phase 1 regulations to reduce emissions from small nonroad spark ignition (“SI”) engines. *See 60 Fed. Reg.* 34582 (July 3, 1995). On April 25, 2000, EPA promulgated more stringent Phase 2 emissions standards for small nonroad SI handheld engines. *See 65 Fed. Reg.* 24268 (April 25, 2000). These regulations, which are known as the Nonroad SI Regulations, set emissions standards and implement requirements to ensure that nonroad SI engines maintain their level of emission performance as they age.

13. Section 213(d) of the Act, 42 U.S.C. § 7547(d), provides that the nonroad regulations shall be enforced in the same manner as the standards for motor vehicles, with such modifications as EPA deems appropriate, and authorized EPA to promulgate regulations that may be necessary to determine compliance with, and enforce, the nonroad standards. Section

203 of the Act, 42 U.S.C. § 7522(a), sets forth a number of prohibited acts relating to the manufacture and importation of motor vehicles.

A. **Certificates of Conformity**

14. 40 C.F.R. § 90.106 requires small nonroad SI engine manufacturers to obtain a certificate of conformity from EPA prior to selling, offering for sale, introducing into commerce, or importing any nonroad SI engines covered by the regulations. Issuance of the certificate of conformity permits production and introduction into commerce of engines built in accordance with the manufacturer's application after the date of the certificate and before expiration of the covered model year.

15. 40 C.F.R. § 90.107 sets forth the information that a manufacturer must include in each certification application, and provides that the application must include an identification and description of the engine and its emission control system.

16. 40 C.F.R. § 90.107(d)(9) further provides that the certification application must contain: "A statement that the test engine(s), as described in the manufacturer's application for certification, has been tested in accordance with the applicable test procedures...required under subparts D and E of this part, and that on the basis of such tests the engine(s) conforms to the requirements of this part."

17. 40 C.F.R. § 90.1003(a)(1)(i) prohibits a manufacturer from introducing new small nonroad SI engines into commerce unless it is covered by a certificate of conformity. 40 C.F.R. § 90.3 defines an "engine manufacturer" to include: "any person engaged in the manufacturing or assembling of new nonroad engines or the importing of such engines for resale, or who acts for and is under the control of any such person in connection with the distribution of such engines."

18. 40 C.F.R. § 90.1003(a)(1)(ii) prohibits any person from importing, or causing the importation, into the United States of any small nonroad SI engine manufactured after the applicable effective date of the regulations unless such engine is covered by a certificate of conformity.

B. Label Requirements

19. 40 C.F.R. § 90.114(a) requires the engine manufacturer to affix, at the time of manufacture of a certified engine, a permanent and legible emissions control information label identifying each nonroad engine and setting forth specific information regarding compliance with the Nonroad SI Regulations.

20. 40 C.F.R. § 90.114(c)(4) further requires the emission label to specifically identify the type of exhaust emissions control system on the engine, such as a catalytic converter.

21. 40 C.F.R. § 90.1003(a)(4)(ii) prohibits the sale, introduction, or delivery into commerce by an engine manufacturer of a new nonroad engine manufactured after the applicable effective date of the regulations, unless a label or tag is affixed to the engine in accordance with the nonroad regulations

C. Production Line Testing Program

22. 40 C.F.R. Part 90, Subpart H requires manufacturers to conduct a production line test program. This program requires manufacturers to perform emission tests on randomly selected products coming off of the assembly line to assure their designs as certified continue to have acceptable emissions performance when put into mass production.

23. 40 C.F.R. § 90.1003(a)(2)(iii) prohibits any person from failing or refusing to perform tests or to have tests performed as required under 40 C.F.R. § 90.703, which sets forth the production line test program.

D. **Reporting Obligations**

24. Section 203(a)(2)(A) of the Act, 42 U.S.C. § 7522(a)(2)(A), prohibits any person from failing or refusing to make reports or provide information to EPA as required by Section 208 of the Act, 42 U.S.C. § 7542.

25. Section 208(a) of the Act, 42 U.S.C. § 7542(a), requires manufacturers to “establish and maintain records, perform tests...make reports, and provide information the Administrator may reasonably require to determine whether the manufacturer...has acted or is acting in compliance with this part and part C of this subchapter and regulations thereunder....”

26. 40 C.F.R. § 90.803 requires a manufacturer to file an emissions defect information Report (“EDIR”) with the Administrator within fifteen (15) business days after a manufacturer determines that a specific emission-related defect exists in twenty-five (25) or more engines of a given engine family manufactured in the same certificate or model year.

27. 40 C.F.R. § 90.802 defines an “emission related defect” as a “defect in design, materials, or workmanship in a device, system, or assembly” described in the application for the certificate of conformity which affects any parameter specified in Appendix VIII of 40 C.F.R. Part 85.

E. **Running Changes**

28. 40 C.F.R. § 90.122 sets forth the process for a manufacturer to amend its application and certificate of conformity, or obtain a “running change.” The engine manufacturer must notify EPA when changes are to be made to a product line covered by a certificate of conformity. The manufacturer must request that its existing certificate of conformity be amended and include specific information to enable EPA to evaluate the request.

29. 40 C.F.R. § 90.122(e)(1) provides an alternative mechanism which allows the manufacturer to “implement the production change without EPA pre-approval provided the request for change together with all...supporting documentation is received at EPA within three working days of implementing the change.”

F. **Penalty Provisions**

30. Section 205(a) of the Act, 42 U.S.C. § 7524(a), and 40 C.F.R. § 90.1006 provide that any violation of Section 203(a)(1), (a)(2), (a)(4), or (a)(5) of the Act, 42 U.S.C. § 7522(a)(1), (a)(2), (a)(4), or (a)(5), and 40 C.F.R. §§ 90.1003(a)(1), (a)(2), (a)(4), or (a)(5) shall be subject to a civil penalty of up to \$25,000 per day of violation or per violation per engine, as applicable. Pursuant to the Civil Monetary Penalty Adjustment Rule, finalized February 13, 2004 and effective March 15, 2004, the maximum civil penalty for violations of Section 203(a)(1) was increased to \$32,500 per day of violation or per violation per engine. 69 *Fed. Reg.* 7121, 7125 (Feb. 13, 2004). Hence, any violations occurring on or after March 15, 2004 are subject to the maximum penalty amount of \$32,500 per day of violation or per violation per engine, as applicable.

31. Section 204 of the Act, 42 U.S.C. § 7523, provides that the “district courts of the United States shall have jurisdiction to restrain violations” of Section 203(a).

GENERAL ALLEGATIONS

A. **2005 Model Year Engines**

32. McCulloch applied to EPA for certificates of conformity to cover 2005 MY engine families 5MHXS.0505AA and 5MHXS.0555AA, which were used to power some of the Subject Chainsaws.

33. EPA issued certificates of conformity for these engine families. The certificates of conformity provided that they covered only those engines which conform, in all material respects, to the design specifications in the certification application.

34. Emissions tests conducted on a sample of the Subject Chainsaws during January of 2007 indicate that the chainsaws equipped with 2005 MY engines substantially exceeded the applicable HC+NOX emissions standard of 119 grams per kilowatt hour ("g/kW-hr"), *see* 40 C.F.R. § 90.103, as well as the HC+NOX certification levels contained in the certification application. These test results indicate that the engines do not conform in all material respects to the design specifications set forth in the application for a certificate of conformity.

35. Subject to the reasonable opportunity for further investigation and discovery, the 2005 MY engines that powered the Subject Chainsaws did not conform in all material respects to the design specifications set forth in the certification application, and certification and production line emissions tests for these engines were not conducted in accordance with the applicable requirements of the Nonroad SI Regulations.

B. 2006 Model Year Engines

36. McCulloch applied to EPA for certificates of conformity to cover 2006 MY engine families 6MHXS.0505AA and 6MHXS.0555AA. The certification applications for both of these engine families stated that the engines would be equipped with catalytic converters.

37. EPA issued certificates of conformity for these engine families. The certificates of conformity provided that they covered only those engines which conform, in all material respects, to the design specifications in the certification application.

38. Emissions tests conducted on a sample of the Subject Chainsaws during January of 2007 indicate that the chainsaws equipped with 2006 MY engines substantially exceeded the applicable HC+NOX emissions standard of 96 g/kW-hr, *see* 40 C.F.R. § 90.103, as well as emissions certification levels in the certification application. These test results indicate that the engines did not conform in all material respects to the design specifications set forth in the certification application. Further, the 2006 MY engines that powered the Subject Chainsaws were not produced with catalytic converters.

39. Subject to the reasonable opportunity for further investigation and discovery, the 2006 MY engines did not conform in all material respects to the design specifications set forth in the certification application.

40. The emission labels affixed to the 2006 MY engines that powered the Subject Chainsaws erroneously stated that the engines were equipped with catalytic converters.

41. On December 15, 2006, McCulloch submitted an amendment to its certification applications, or “running changes,” which stated that engine families 6MHXS.0505AA 6MHXS.0555AA would not be produced with a catalytic converter.

42. On December 20, 2006, McCulloch advised EPA that it had been using the wrong emissions labels for certain 2006 MY chainsaws, and that the labels should have indicated that the engines were not equipped with catalytic converters.

43. On January 8, 2007, McCulloch submitted an EDIR to EPA identifying defects in engine family 6MHXS.0505AA. The EDIR stated that there is no emission impact for the subject engines at issue because the May 2006 emission tests without catalytic converters indicated compliance with the applicable emissions standards.

FIRST CLAIM FOR RELIEF

(Introduction of Uncertified 2005 MY Nonroad Engines Into Commerce)

44. The United States realleges Paragraphs 1 through 43 above as if fully set forth herein.

45. Subject to the reasonable opportunity for further investigation and discovery, one or more of the Defendants violated Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. § 90.1003(a)(1)(i) by introducing into commerce or causing the introduction into commerce of approximately 129,000 2005 MY chainsaws equipped with small nonroad SI engines that did not conform in all material respects to the design specifications set forth in the certification application, and therefore were not covered by a valid certificate of conformity.

46. Pursuant to Section 204(a) of the Act, 42 U.S.C. § 7523(a), and 40 C.F.R. § 90.1005, the violations identified above subject the Defendants to injunctive relief; and, pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), and 40 C.F.R. § 90.1006(a)(1), the violations identified above subject the Defendants to civil penalties of up to \$32,500 per engine.

SECOND CLAIM FOR RELIEF

(Importation of Uncertified 2005 MY Nonroad Engines)

47. The United States realleges Paragraphs 1 through 46 above as if fully set forth herein.

48. Subject to the reasonable opportunity for further investigation and discovery, one or more of the Defendants violated Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. § 90.1003(a)(1)(ii) by importing or causing the importation of approximately 129,000 2005 MY chainsaws equipped with small nonroad SI engines that did not conform in all

material respects to the design specifications set forth in the certification application, and therefore were not covered by a valid certificate of conformity.

49. Pursuant to Section 204(a) of the Act, 42 U.S.C. § 7523(a), and 40 C.F.R. § 90.1005, the violations identified above subject the Defendants to injunctive relief; and pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), and 40 C.F.R. § 90.1006(a)(1), the violations identified above subject the Defendants to civil penalties of up to \$32,500 per engine.

THIRD CLAIM FOR RELIEF

(Failure to Properly Test 2005 MY Nonroad Engines)

50. The United States realleges Paragraphs 1 through 49 above as if fully set forth herein.

51. Subject to the reasonable opportunity for further investigation and discovery, one or more of the Defendants violated Section 203(a)(2)(C) of the Act, 42 U.S.C. § 7423(a)(2)(C), and 40 C.F.R. § 90.1003(a)(2)(iii) by failing to correctly perform emissions tests on engine families 5MHXS.0505AA and 5MHXS.0555AA as required under 40 C.F.R. § 90.119, which sets forth the applicable certification testing procedures, and 40 C.F.R. § 90.703, which sets forth the production line test program.

52. Pursuant to Section 204(a) of the Act, 42 U.S.C. § 7523(a), and 40 C.F.R. § 90.1005, the violations identified above subject the Defendants to injunctive relief; and pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), and 40 C.F.R. § 90.1006(a)(5), the violations identified above subject the Defendants to civil penalties of up to \$32,500 per day of violation.

FOURTH CLAIM FOR RELIEF

(Introduction of Uncertified 2006 MY Nonroad Engines Into Commerce)

53. The United States realleges Paragraphs 1 through 52 above as if fully set forth herein.

54. One or more of the Defendants violated Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. § 90.1003(a)(1)(i) by introducing into commerce or causing the introduction into commerce of approximately 71,000 2006 MY chainsaws equipped with small nonroad SI engines that did not conform in all material respects to the design specifications set forth in the certification application, and therefore were not covered by a valid certificate of conformity.

55. Pursuant to Section 204(a) of the Act, 42 U.S.C. § 7523(a), and 40 C.F.R. § 90.1005, the violations identified above subject the Defendants to injunctive relief; and pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), and 40 C.F.R. § 90.1006(a)(1), the violations identified above subject the Defendants to civil penalties of up to \$32,500 per engine.

FIFTH CLAIM FOR RELIEF

(Importation of Uncertified 2006 MY Nonroad Engines)

56. The United States realleges Paragraphs 1 through 55 above as if fully set forth herein.

57. One or more of the Defendants violated Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. § 90.1003(a)(1)(ii) by importing or causing the importation of approximately 71,000 2006 MY chainsaws equipped with small nonroad SI engines that did

not conform in all material respects to the design specifications set forth in the certification application, and therefore were not covered by a valid certificate of conformity.

58. Pursuant to Section 204(a) of the Act, 42 U.S.C. § 7523(a), and 40 C.F.R. § 90.1005, the violations identified above subject the Defendants to injunctive relief; and pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), and 40 C.F.R. § 90.1006(a)(1), the violations identified above subject the Defendants to civil penalties of up to \$32,500 per engine.

SIXTH CLAIM FOR RELIEF

(Introduction of 2006 MY Nonroad Engines into Commerce with Invalid Emissions Labels)

59. The United States realleges Paragraphs 1 through 58 above as if fully set forth herein.

60. One or more of the Defendants violated Section 203(a)(4) of the Act, 42 U.S.C. § 7522(a)(4), and 40 C.F.R. § 90.1003(a)(4)(ii) by introducing approximately 71,000 2006 MY nonroad engines into commerce with emission labels that did not properly identify the type of exhaust emissions control system on the engines as required by 40 C.F.R. § 90.114(b)(4).

61. Pursuant to Section 204(a) of the Act, 42 U.S.C. § 7523(a), and 40 C.F.R. § 90.1005, the violations identified above subject the Defendants to injunctive relief; and pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), and 40 C.F.R. § 90.1006(a)(1), the violations identified above subject the Defendants to civil penalties of up to \$32,500 per engine.

SEVENTH CLAIM FOR RELIEF

(Failure to File EDIRs for 2006 MY Nonroad Engines)

62. The United States realleges Paragraphs 1 through 61 above as if fully set forth herein.

63. An emission related defect, as defined by 40 C.F.R. §90.803(a)(2), exists in twenty-five (25) or more of the engines of each engine family that powers the 2006 MY Subject Chainsaws.

64. One or more of the Defendants determined, or should have determined, that an emissions defect existed in the 2006 MY engines that power the 2006 MY Subject Chainsaws, but failed to file complete and timely EDIRs with EPA, in violation of Section 203(a)(2)(A) of the Act, 42 U.S.C. § 7522(a)(2)(A), and 40 C.F.R. § 90.803. Specifically, the 2006 MY Subject Chainsaws did not contain catalytic converters, as certified, which was a “defect in the design, materials, or workmanship in a device, system, or assembly,” and therefore constitutes an emissions defect within the meaning of 40 C.F.R. § 90.803.

65. Pursuant to Section 204(a) of the Act, 42 U.S.C. § 7523(a), and 40 C.F.R. § 90.1005, the violations identified above subject the Defendants to injunctive relief; and pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), and 40 C.F.R. § 90.1006(a)(5), the violations identified above subject the Defendants to civil penalties of up to \$32,500 per day of violation.

EIGHTH CLAIM FOR RELIEF

(Failure to Amend Certificate of Conformity for 2006 MY Nonroad Engines)

66. The United States realleges Paragraphs 1 through 65 above as if fully set forth herein.

67. One or more of the Defendants violated Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. § 90.122 by failing to notify EPA prior to making material design changes to the product line covered by the certificate of conformity for the 2006 MY engines that powered the Subject Chainsaws and that were certified with catalytic converters.

68. Pursuant to Section 204(a) of the Act, 42 U.S.C. § 7523(a), and 40 C.F.R. § 90.1005, the violations identified above subject the Defendants to injunctive relief; and pursuant to Section 205(a) of the Act, 42 U.S.C. § 7524(a), and 40 C.F.R. § 90.1006(a)(5), the violations identified above subject the Defendants to civil penalties of up to \$32,500 per day of violation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States respectfully prays that this Court provide the following relief:

- a. A permanent injunction directing Defendants to take steps necessary to come into permanent and consistent compliance with the Nonroad SI Regulations set forth at 40 C.F.R. Part 90.
- b. A judgment assessing civil penalties against Defendants and in favor of the United States, not to exceed \$32,500 per day of violation or per violation per engine, as applicable.
- c. Award the United States its costs and disbursements in this action; and
- d. Grant such other relief as this Court deems appropriate.

Respectfully Submitted,

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources
Division

CATHERINE BANERJEE ROJKO
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
Post Office Box 7611
Washington, D.C. 20044

202.514.5315
202.514.0097 (fax)
District of Columbia Bar No. 415927

OF COUNSEL:

Jeffrey A. Kodish, Esq.
Attorney-Advisor
Office of Enforcement and Compliance Assurance
Mobile Sources Enforcement Branch
Western Field Office (8MSU)
U.S. Environmental Protection Agency
1595 Wynkoop Street
Denver, CO 80202